Office-Supreme Court, U.S.
FILED
AUG 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1929

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE BALTIMORE AND OHIO RAILROAD CO. AND THE CHESAPEAKE AND OHIO RAILWAY CO., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CONSTANCE L. DUPRE
Acting General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTIONS PRESENTED

1. Whether petitioners' involuntary retirement in 1971 and 1972 of employees between the ages of 60 and 65 violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

2. Whether petitioners' 1974 amendment of their retirement plans to reduce the mandatory retirement age to 62 violated the ADEA.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Benzel v. *Valley National Bank of Arizona*, 633 F. 2d 1325 7

Carpenter v. *Continental Trailways*, 635 F. 2d 578 9

Clifton D. Mayhew, Inc. v. *Wirtz*, 413 F. 2d 658 12

EEOC v. *Eastern Airlines, Inc., No. 79-3960* (5th Cir. Apr. 14, 1981) 9

EEOC v. *Home Insurance Co.*, No. 78 CIV 6242 (S.D.N.Y. Jan. 21, 1981), appeal docketed, No. 81-6055 (2d Cir., filed Mar. 19, 1981) 9

EEOC v. *Sandia Corp.*, 639 F. 2d 600 10

Gonsalves v. *Caterpillar Tractor Co.*, 634 F. 2d 1065, cert. denied (Apr. 21, 1981) 8

Loeb v. *Textron Inc.*, 600 F. 2d 1003 7

Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 6

Page

Cases—Continued:

Marshall v. *Atlantic Container Line, G.I.E.*, 470 F. Supp. 71 9

McCorstin v. *U.S. Steel Corp.*, 621 F. 2d 749 10

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 ..... 6, 7

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 6

Ramirez v. *Sloss*, 615 F. 2d 163 7

Sexton v. *Beatrice Foods Co.*, 630 F. 2d 478 7

Smart v. *Porter Paint Co.*, 630 F. 2d 490 9

United Air Lines, Inc. v. *McMann*, 434 U.S. 192 ..... 5, 8, 9, 11

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.* :

Sections 2 *et seq.*, 29 U.S.C. 621 *et seq.* 3
Section 4(a)(1), 29 U.S.C. 623(a)(1) 6
Section 4(f)(2), 29 U.S.C. 623(f)(2) 3, 4, 7, 8, 10, 11
Section 4(f)(2), 29 U.S.C. (Supp. III) 623(f)(2) 4, 10
Section 7(e), 29 U.S.C. 626(e) 3, 11, 12
Section 12(a), 29 U.S.C. (Supp. III) 631(a) 10

Portal-to-Portal Act of 1947, Section 10, 29 U.S.C. 259 ..... 3, 11

Page

Miscellaneous:

H.R. Rep. No. 95-950, 95th Cong., 2d Sess. (1978) 11

Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1929

THE BALTIMORE AND OHIO RAILROAD CO. AND THE CHESAPEAKE AND OHIO RAILWAY CO., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 632 F. 2d 1107. The decision of the district court (Pet. App. 14a-41a) is reported at 461 F. Supp. 362.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on September 23, 1980. A petition for rehearing was denied on December 17, 1980 (Pet. App. 59a-60a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1971, in response to economic setbacks, petitioners, two railroad companies under consolidated management, decided to reduce their work force. They chose to retire involuntarily 142 employees who, by virtue of their age and length of service, were entitled to pensions under petitioners' private pension plans. These employees were selected for involuntary retirement because of their pension entitlement, and their pension eligibility was based solely on age and years of service (Pet. App. 3a). At the time of termination, the employees were either between the ages of 60 and 62 with at least 20 years of service or between the ages of 62 and 65 with at least 10 years of service. It is undisputed that the employees were performing their duties satisfactorily at the time of their involuntary retirement.

At the time of the employee terminations, the pension plan in effect for petitioner Chesapeake and Ohio Railway Company authorized compulsory retirement at the normal retirement age of 65. The pension plan in effect for petitioner Baltimore and Ohio Railroad Company did not contain a provision regarding either normal or compulsory retirement, although a company brochure referred to 65 as normal retirement age (Pet. App. 5a & nn.2, 3, 6a). Neither plan authorized involuntary retirement on the basis of age prior to age 65. Petitioners' vice-president testified that the involuntary retirement of employees prior to the age provided in the pension plans was "an inherent right of management in managing the business * * *. It has nothing to do with the plan" (*id.* at 5a). After the Department of Labor began investigating the involuntary, age-based terminations, petitioners amended their pension plans, effective January 1, 1974, to reduce the mandatory retirement age from 65 to 62 (*id.* at 10a).

In June 1974, the Department of Labor filed this employment discrimination action in the United States District Court for the District of Maryland, alleging that petitioners violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, by involuntarily retiring 142 employees because of their age-related entitlement to company pensions and by amending their pension plans to lower the mandatory retirement age from 65 to 62.[1] The district court found that the facts established a prima facie violation of the ADEA (Pet. App. 29a). It further ruled, however, that under Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2), as it stood prior to its amendment in 1978, petitioners' actions were not unlawful, because they were taken "to observe the terms of a * * * bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter" (Pet. App. 30a). In addition, the district court held (*id.* at 37a-40a) that petitioners had acted "in good faith in conformity with and in reliance on" written administrative interpretations of the Act and therefore were entitled to the exemption from liability provided by Section 7(e) of the Act, 29 U.S.C. 626(e), incorporating Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. 259. The court concluded that, because petitioners had terminated the 142 employees in the observance of a bona fide pension plan, as authorized by Section 4(f)(2) of the Act, petitioners had acted in reasonable reliance on opinion letters of the Department of Labor's Wage-Hour Administrator and an ADEA Interpretative Bulletin, which stated that the statute

---

[1]The Equal Employment Opportunity Commission was substituted as appellant after the briefs were filed in the court of appeals. In 1978, Congress transferred enforcement responsibilities under the ADEA from the Secretary of Labor to the Commission. See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978).

permitted involuntary retirement before age 65, "provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of Section 4(f)(2)" (Pet. App. 38a).

The court of appeals reversed. It endorsed the district court's conclusion that prima facie violations of the Act had been established and held that petitioners' conduct did not qualify for any of the exemptions from the Act's prohibitions.

The court ruled that because neither the express nor the implied provisions of the railroad pension plans authorized involuntary retirement on the basis of age before 65, the termination of the 142 employees "could not have been to observe the terms of the plans" (Pet. App. 8a). The court explained that "[a] successful 4(f)(2) defense requires that the involuntary termination be pursuant to the pension plan's design—not to a discretionary act of management" (*id.* at 7a). The court also held that the lowering of the mandatory retirement age from 65 to 62 in 1974 in order "to effect continued forced retirements based on age" was a "subterfuge to evade the purpose[s]" of the Act and therefore was not protected by Section 4(f)(2) (Pet. App. 11a-12a).[2]

The court of appeals rejected petitioners' defense of good faith reliance on administrative interpretations of the Act. The court observed that the opinion letters and interpretive bulletin at issue authorized involuntary retirement on the

---

[2]Section 4(f)(2) was amended in 1978 to eliminate the exemption for bona fide employee benefit plans that require or permit involuntary retirement on the basis of age before age 65. 29 U.S.C. (Supp. III) 623(f)(2). The EEOC argued in the court of appeals that the 1978 amendment invalidated petitioners' amended pension plans, but, because the court held that the reduction of the plans' involuntary retirement age to 62 was a subterfuge and therefore was not in any event entitled to Section 4(f)(2)'s exemption, the court did not consider the effect of the 1978 amendment.

basis of age only "if pursuant to the terms of a pension plan" (Pet. App. 9a). Because the court had already held that petitioners' pension plans did not permit involuntary retirement before age 65, it ruled that petitioners' alleged reliance on the opinion letters was unjustified (*id.* at 9a-10a). Moreover, the court said, the administrative interpretations were not sufficiently specific to cover petitioners' situation, and petitioners did not present "objective evidence that [they] relied on [the interpretive bulletin] in good faith" (*id.* at 10a). With respect to the amendment of the pension plans to lower the involuntary retirement age to 62, the court noted that, on more than one occasion before the companies' action, the Department of Labor had notified petitioners that the mandatory retirement of employees before the age of 65 violated the Act. For this reason, the court ruled (*id.* at 12a-13a), petitioners could not establish that they had relied in good faith on a 1968 opinion letter of the Wage-Hour Administrator, which, the court agreed, was "generally supportive of the railroad companies' position" (*id.* at 12a).

ARGUMENT

The court of appeals correctly held that the forced retirement of 142 persons based on their age and length of service violated the Age Discrimination in Employment Act of 1967 and could not be justified by the terms of petitioners' pension plans. The court also ruled correctly that the 1974 amendment of the pension plans to lower the involuntary retirement age to 62 was designed to evade the goals of the ADEA. In any event, the modified pension plans are clearly inconsistent with the ADEA, as amended in 1978. The court of appeals' decision, therefore, has little or no prospective significance, because the Act as it now stands flatly prohibits employee benefit plans that require or permit involuntary retirement based on age before the age of 70.The ruling below does not conflict with this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S.

192 (1977), or with any of the other appellate decisions interpreting the ADEA. Further review, accordingly, is not warranted.

1. The district court and the court of appeals both correctly held that petitioners' practice of discharging employees on the basis of their age-related eligibility for retirement benefits constitutes a *per se* violation of Section 4(a)(1) of the ADEA, which prohibits the discharge or an employee "because of such individual's age." 29 U.S.C. 623(a)(1). Although petitioners argue that the terminations were based "not on the employees' age as such, but on the employees' entitlement to a pension" (Pet. 11), it is undisputed that pension eligibility "was based solely on age and years of service" (Pet. App. 3a). As the court of appeals recognized, the employees would not have been forced to retire "but for" their age. This practice is discriminatory on its face and violates the Act unless supported by a valid defense. See *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 712-713 (1978). Indeed, petitioners' "age plus" argument is of a piece with, and no more persuasive than, the "sex plus" argument that was unanimously rejected in the first case argued to this Court under Title VII of the Civil Rights Act of 1964. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (involving employer discrimination against only those women with pre-school-age children).

Contrary to petitioners' apparent contention, nothing in the Act authorizes an employer to select employees under the age of 65 for mandatory retirement on the basis of age, whenever the employer concludes that such a course is required for the employer's economic well-being and for the benefit of other employees.[3] While petitioners' effort to

---

[3]Contrary to petitioners' arguments (Pet. 10-15), the decision below does not conflict with *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and its progeny. The pattern of proof outlined in *McDonnell Douglas* is designed to determine whether particular employment

restrict their reduction in force to employees eligible for retirement benefits might have been a reasonable choice in the absence of the ADEA, petitioners' real complaint is that Congress deprived them of that option. But any reassessment of that policy judgment must, of course, be made by Congress, rather than by the courts or by those charged with the Act's enforcement.

2. Petitioners' repeated assertion that the termination of the 142 railroad employees was undertaken "to observe the terms of a * * * bona fide employee benefit plan," as authorized by Section 4(f)(2) of the Act, is wholly without basis in fact. The simple truth is that neither of petitioners' pension plans required or permitted involuntary retirement on the basis of age before age 65. None of petitioners' elaborate argumentation can gainsay that critical fact. The court of appeals' ruling is based on a correct, literal, and commonsense reading of the clear statutory language of Section 4(f)(2): in order for an employer to establish that it acted as it did "to observe the terms" of a retirement plan, the action taken must be one compelled or at least specifically authorized by those terms. Otherwise, the action is simply not one undertaken for the purpose of observing the terms of a pension plan. Every other court of appeals to have addressed the issue has agreed that the exemption in the original version of Section 4(f)(2) is unavailable where the retirement plan does not provide for involuntary retirement before age 65. See *Benzel* v. *Valley National Bank of Arizona*, 633 F. 2d 1325, 1327 (9th Cir. 1980); *Sexton* v. *Beatrice Foods Co.*, 630 F. 2d 478 (7th Cir. 1980). Cf.

---

decisions were based on impermissible criteria in cases where there is doubt. In a case such as this, however, where the employer's policy is based expressly on age, resort to the *McDonnell Douglas* formula to establish an inference of discrimination is unnecessary; the showing has been made directly. *Ramirez* v. *Sloss*, 615 F. 2d 163, 168 (5th Cir. 1980); *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003, 1017 (1st Cir. 1979).

Gonsalves v. *Caterpillar Tractor Co.*, 634 F. 2d 1065 (7th Cir. 1980), cert. denied, No. 80-1380 (Apr. 20, 1981). None of the cases cited by petitioners holds otherwise.[4]

It is undisputed that petitioners' plans did not expressly confer upon the companies any right to force retirement before age 65 (Pet. App. 6a, 31a). It is also undisputed, as the court of appeals recognized, that "all * * * previous terminations [prior to age 65] were both unrelated to the pension plans and made under company authority exclusive of the pension plans" (*id.* at 7a). As petitioners' own officer testified (*id.* at 5a), the "past terminations were based on 'an inherent right of management in managing * * * personnel. It has nothing to do with the plan.' " The court of appeals did not hold, as petitioners assert, that any element of managerial discretion under a retirement plan renders the Section 4(f)(2) exemption inapplicable; rather, the court properly concluded that Section 4(f)(2) by its terms does not protect acts of managerial discretion that "hav[e] nothing to do with the pension plans" (Pet. App. 7a).[5]

3. The court of appeals correctly ruled that petitioners' amendment of their retirement plans in 1974 to reduce the mandatory retirement age was a "subterfuge to evade the purpose[s]" of the ADEA and therefore was not entitled to a Section 4(f)(2) exemption. This holding accords with the

---

[4]All of the cases on which petitioners rely (Pet. 17, 19) involved retirement plans that expressly provided for involuntary retirement at an age below 65.

[5]Accordingly, the decision below does not conflict with the cases cited by petitioners (Pet. 19) holding that retirement pursuant to express provisions in a plan authorizing early involuntary retirement at the option of the employer was within the scope of Section 4(f)(2) prior to its 1978 amendments. Nor is the court of appeals' ruling in the present case at odds with *United Air Lines, Inc.* v. *McMann, supra*, in which this Court simply construed the "normal" retirement age of 60 expressly set forth in the employer's plan as authorizing mandatory involuntary retirement at that age.

decision of this Court in *United Air Lines, Inc.* v. *McMann, supra,* and with the decisions of other courts of appeals that interpreted Section 4(f)(2) as originally enacted. In *McMann* (434 U.S. at 203), the Court held that a provision in a plan adopted prior to the enactment of the ADEA cannot be a subterfuge to evade a statute passed years later. By contrast, when, as here, a retirement plan has been amended after the effective date of the ADEA, an employer cannot show the absence of an impermissible motive merely by pointing to the chronology of events. At least two courts of appeals have directly addressed the proof required to show that a post-ADEA amendment to a retirement plan is not a subterfuge to evade the purpose of the Act. Both of these courts have held that, in order to defend an amendment of the kind at issue here, an employer must advance legitimate non-discriminatory reasons for lowering its mandatory retirement age. *Smart* v. *Porter Paint Co.*, 630 F. 2d 490, 495 (7th Cir. 1980); *EEOC* v. *Eastern Airlines, Inc.*, No. 79-3960 (5th Cir. Apr. 14, 1981), slip op. 8. Cf. Carpenter v. *Continental Trailways,* 635 F. 2d 578 (6th Cir. 1980).[6]

---

[6]Although the court in *Carpenter* ultimately found no subterfuge in the adoption of the optional retirement plan at issue there, the court did say that a plan adopted or amended after the passage of the ADEA "should undergo more thorough scrutiny" (635 F. 2d at 581). See also *EEOC* v. *Home Insurance Co.*, No. 78 CIV. 6242 (S.D.N.Y. Jan. 21, 1981), appeal docketed, No. 81-6055 (2d Cir., filed Mar. 19, 1981) (holding that employer's reasons for post-Act reduction of the mandatory retirement age must be examined, but finding no subterfuge on the basis of the reasons articulated); accord, *Marshall* v. *Atlantic Container Line, G.I.E.*, 470 F. Supp. 71 (S.D.N.Y. 1979).

The only purpose ever articulated by petitioners for lowering the mandatory retirement age was the reduction of their work force. Under the amended plan, this purpose would be accomplished at the express and specific expense of the older workers employed by petitioners. But, as the federal courts have recognized, the ADEA forbids involuntary retirement on the basis of age at age 62, even if an employer can demonstrate that some reduction in its work force is economically necessary. See *McCorstin* v. *U.S. Steel Corp.*, 621 F. 2d 749 (5th Cir. 1980); *EEOC* v. *Sandia Corp.*, 639 F. 2d 600 (10th Cir. 1980).[7] The amendments to the pension plan in the present case were designed for no other purpose than to evade the prohibitions of the Act against age-based terminations before age 65. The court of appeals therefore properly ruled that the amendments were a "subterfuge" not entitled to protection under Section 4(f)(2).

4. Wholly apart from the "subterfuge" question, the 1974 amendments to petitioners' pension plans have unquestionably been invalid ever since April 6, 1978, the effective date of the 1978 amendment to Section 4(f)(2) of the Act. That amendment was intended to invalidate pension plan features of the kind sustained in *McMann*. It stated that no "seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 69] because of the age of such individual" (29 U.S.C. (Supp. III) 623(f)(2)).[8] The conference report on the 1978 amendments explicitly announced

---

[7]The court of appeals concluded and rejected petitioners' argument that forced retirement of older workers was required by business necessity, noting that while "economic crisis precipitated the necessity for reducing their work force[, t]hat factor provided no incentive for the layoff or retirement of this particular group" (Pet. App. 5a).

[8]The 1978 amendment to Section 12(a) of the Act, 29 U.S.C. (Supp. III) 631(a), increased the upper limit of the age group protected by the statute to 70, effective January 1, 1979.

the congressional disagreement with the result reached in *McMann* and stated that "[pension p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 7-8 (1978). Thus, whatever may have been the status of petitioners' 1974 modifications of their pension plans prior to the 1978 statutory changes, it is clear that petitioners may not now require retirement on the basis of age before age 70. For this reason, any possible inadequacy in the reasoning underlying the court of appeals' invalidation of the 1974 pension plan amendments lacks prospective significance and, accordingly, does not warrant review by this Court.

5. Finally, petitioners' attempt to avail themselves of the defense provided in Section 7(e) of the Act, 29 U.S.C. 626(e), incorporating Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. 259, is without merit. Neither the involuntary retirement of 142 employees nor the change in the pension plans' mandatory retirement age was undertaken "in good faith in conformity with and in reliance on" applicable written administrative interpretations of the ADEA.

With respect to the terminations in 1971 and 1972 of employees between the ages of 60 and 65, the opinion letter and interpretive bulletin on which petitioners rely merely authorized involuntary retirement pursuant to the terms of a bona fide retirement plan. Petitioners' attempt to assert a Section 7(e) defense therefore begs the question whether the employee terminations were effected in order to observe the terms of petitioners' pension plans. For this reason, the availability of a Section 7(e) defense in connection with the dismissal of the individual employees turns entirely on the availability of a Section 4(f)(2) defense for that action. And since, as we have already explained, petitioners were not entitled to a Section 4(f)(2) defense because their pension

plans did not require or expressly authorize mandatory retirement before age 65, they were similarly not entitled to a Section 7(e) defense.

With respect to the 1974 amendments to petitioners' pension plans, the argument is slightly different, although the result is the same. It is true, as the court of appeals acknowledged (Pet. App. 12a), that a 1968 opinion letter of the Wage-Hour Administrator was "generally supportive of the railroad companies' position" (see also Pet. 5-6). But, as the court of appeals also observed, petitioners presented only the scantiest evidence of any actual reliance on this letter, and in any event, by the time the pension plan amendments were adopted, the railroad companies plainly were aware that the Department of Labor did not approve of their efforts to retire employees involuntarily on the basis of age before age 65. Petitioners knew they were being investigated by the Department of Labor for possible noncompliance with the ADEA, and they nevertheless completed the involuntary retirements even after the Department of Labor compliance officer informed them that in his view the retirements violated the Act. After being twice advised by the government that they had violated the Act, petitioners amended their pension plans to reduce the mandatory retirement age. If petitioners did not recognize that their actions were suspect, it was because they "did not look, or looking, did not see or want to see, what was so plainly there." *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F. 2d 658, 663 (4th Cir. 1969).

In any event, the correctness of the court of appeals' ruling on petitioners' asserted Section 7(e) defense with respect to the reduction of the involuntary retirement age to 62 is a highly fact-bound matter that does not independently deserve the attention of this Court. Not only does it turn exclusively on the particular sequence of events in the

course of the Department of Labor's investigation of petitioners in the early 1970's, but, as we have previously observed, it lacks prospective importance due to the 1978 amendments to the ADEA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CONSTANCE L. DUPRE
Acting General Counsel
Equal Employment Opportunity Commission

AUGUST 1981

DOJ-1981-08